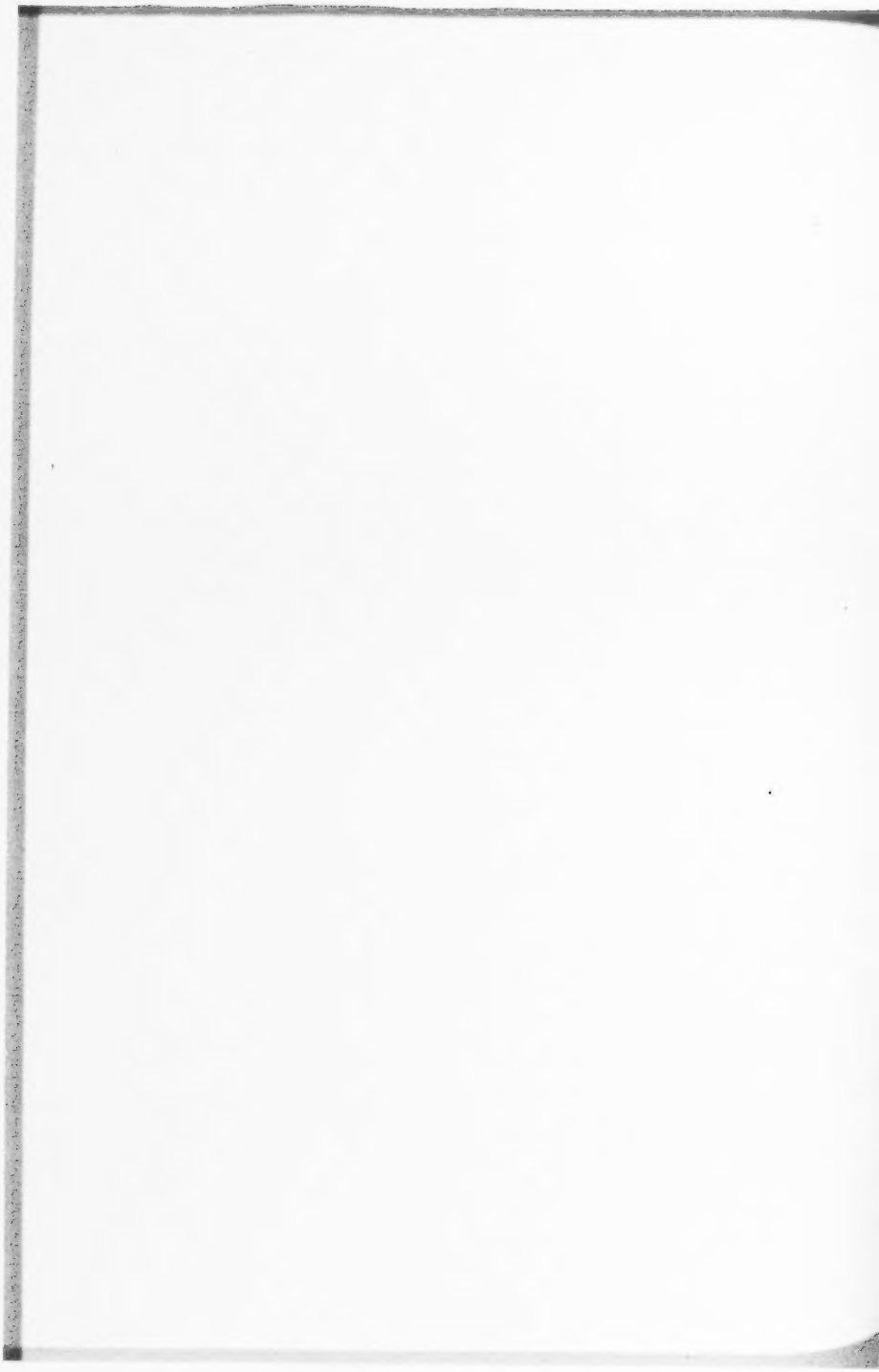

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 13 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 736 [redacted] 11

T. C. FULTON, W. V. FISHER AND J. D. DILWORTH,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

STATEMENT AS TO JURISDICTION.

HUGH C. LAUGHLIN,
FRED E. FULLER,
Counsel for Appellants.

FRED A. SMITH,
WELLES, KELSEY, COBOURN & HARRINGTON,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Judgment and appeal	1
Jurisdiction	2
Statutes	2
Nature of case and ruling below	5
The questions are substantial	5
Appendix "A"—Oral opinion rendered by the Court, February 27, 1942, granting motion of Anchor Hocking Glass Corp., and associated individuals to dismiss	11
Appendix "B"—Oral opinion of the Court rendered June 26, 1942, overruling plaintiff's motion to rehear the motion of Anchor Hocking Glass Corp., and associated individual defendants for dismissal of the complaint, etc.	14

Table of Cases Cited.

Atlantic Cleaners and Dyers, Inc. v. *U. S.*, 286 U. S. 427	2
Chrysler Corporation v. *U. S.*, 316 U. S. 556	2
Ethyl Gasoline Corporation v. *U. S.*, 309 U. S. 436	2
International Business Machines Corp. v. *U. S.*, 298 U. S. 131	2
Missouri-Kansas Pipe Line Co. v. *U. S.*, 312 U. S. 502	2
Sugar Institute v. *U. S.*, 297 U. S. 553	2
Swift & Co. v. *U. S.*, 276 U. S. 311	2
Terminal Railroad Assoc. v. *U. S.*, 266 U. S. 17	2
United Shoe Machinery Co. v. *U. S.*, 258 U. S. 451	2
United States v. *California Canneries*, 279 U. S. 553	2
United States v. *Masonite Corporation*, 316 U. S. 265	2
United States v. *Univis Lens Co.*, 316 U. S. 241	2

Statutes Cited.

Clayton Act of October 15, 1914, Sections 3 and 15 (Act of October 15, 1914, c. 323, Secs. 3 and 15, 38 Stat. 731 and 736, 15 U. S. C. Secs. 14 and 25)	2

Page

Expediting Act of February 11, 1903, Section 2 as amended (32 Stat. 823;) as amended by the Act of March 3, 1911 (36 Stat. 1167; 15 U. S. C. 29) 2

Judicial Code, Section 238, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345) 2

Sherman Act of July 2, 1890, Sections 1, 2 and 4 (Act of July 2, 1890, c. 647, Secs. 1, 2 and 4, 26 Stat. 209, as amended by 36 Stat. 1167 and 50 Stat. 693, 15 U. S. C. Secs. 1, 2 and 4) 2

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Civil Action No. 4426

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARTFORD-EMPIRE COMPANY, ET AL.,
Defendants.

STATEMENT AS TO JURISDICTION ON BEHALF OF T. C. FULTON, W. V. FISHER AND J. D. DILWORTH.

In compliance with Rule 12 of the Supreme Court of the United States, T. C. Fulton, W. V. Fisher and J. D. Dilworth, three of the defendants in the above entitled cause, file this Statement showing the basis on which the Supreme Court has jurisdiction on appeal to review the Final Judgment entered herein:

Judgment and Appeal.

The Final Judgment of the District Court herein sought to be reviewed was entered October 8, 1942.

A Petition for Allowance of Appeal was filed on December 7, 1942, and is presented to the District Court herewith December 7, 1942.

Jurisdiction.

The statutory jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903 (32 Stat. 823) as amended by the Act of March 3, 1911 (36 Stat. 1167; U. S. Code, Title 15, Section 29) and by Section 238 of the Judicial Code as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938; U. S. Code, Title 28, Section 345).

Among the decisions believed to sustain the jurisdiction of this appeal by the Supreme Court of the United States are *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451; *Terminal Railroad Association* v. *United States,* 266 U. S. 17, 28; *Swift & Co.* v. *United States,* 276 U. S. 311; *United States* v. *California Canneries,* 279 U. S. 553, 558; *Atlantic Cleaners and Dyers, Inc.* v. *United States,* 286 U. S. 427; *International Business Machines Corp.* v. *United States,* 298 U. S. 131; *Sugar Institute* v. *United States,* 297 U. S. 553; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436; *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U. S. 502; *United States* v. *Masonite Corporation,* 316 U. S. 265; *United States* v. *Univis Lens Co.,* 316 U. S. 241; *Chrysler Corporation* v. *United States,* 316 U. S. 556.

Statutes.

The Sherman Act of July 2, 1890, Sections 1, 2 and 4 (Act of July 2, 1890, c. 647, Secs. 1, 2 and 4, 26 Stat. 209, as amended by 36 Stat. 1167 and 50 Stat. 693, 15 U. S. C. Secs. 1, 2 and 4):

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any such contract or en-

gage in any such combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

The Clayton Act of October 15, 1914, Sections 3 and 15 (Act of October 15, 1914, c. 323, Secs. 3 and 15, 38 Stat. 731 and 736, 15 U. S. C. Secs. 14 and 25):

"Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods,

wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

"Sec. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof."

Nature of Case and Ruling Below.

The complaint in this case was filed on December 11, 1939.

Bills of particulars were filed by plaintiff in response to the motions of various of the defendants, and answers were filed by all the defendants, and supplemental answers were filed by some of them.

The complaint, as supplemented by the bills of particulars, charged and alleged in general that over a period of years there had been established and maintained by and between certain of the defendants in violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, a "principal" conspiracy, monopoly and combination in restraint of trade with respect to (1) patents covering automatic machinery for the production of pressed and blown glassware and glass containers, and (2) the manufacture and distribution of automatic machinery for the production of pressed and blown glassware and glass containers; and that incidental to said "principal" conspiracy, monopoly and combination, certain "incidental" conspiracies, monopolies and combinations were from time to time established and effectuated in violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act through the control over said patents on automatic machinery for the production of pressed and blown glassware and glass containers, and through the control of the manufacture and distribution of said automatic machinery for the production of pressed and blown glassware and glass containers, and that the various defendants from time to time either directly joined or became connected with, a member of and a participant in said "principal" conspiracy, monopoly and combination, as above described, or through the "incidental" conspiracies, monopolies and combinations above referred to.

The defendants included the Hartford-Empire Company, the owner and licensor of numerous patents on, and the lessor of, automatic machinery for the manufacture of pressed and blown glassware and glass containers, and also included several other corporations owning patents on, and/or engaged in the manufacture and distribution of automatic machinery for the manufacture of pressed and blown glassware and glass containers, and other corporations which neither owned patents on automatic machinery for the production of pressed and blown glassware and glass containers, nor were engaged in the manufacture or distribution of such automatic glass-making machinery, including Anchor Hocking Glass Corporation which was exclusively engaged in the manufacture of glassware, using for said purpose largely automatic machinery leased or licensed to it by the Hartford-Empire Company under its patents, and included as well numerous individuals who were officers or directors of the various corporate defendants, and as such, had participated in the direction and management of said various corporate defendants.

Appellants T. C. Fulton and W. V. Fisher are officers, directors and stockholders of Anchor Hocking Glass Corporation, and appellant J. D. Dilworth is a director and stockholder of Anchor Hocking Glass Corporation, and the complaint charges that as such officers and directors of said corporation they had participated in the "direction and management" of said corporation and had "approved, authorized, ordered and done some or all of the acts therein alleged to have been performed by" said Anchor Hocking Glass Corporation, which said corporation it was alleged "In 1937 * * * joined the conspiracy, monopoly and combination in restraint of trade." Although not averred in the complaint, appellants T. C. Fulton, W. V. Fisher and J. D. Dilworth are also stockholders of the Hartford-

Empire Company, but have never been either officers or directors of said company.

The cause was heard before the Honorable Frank L. Kloeb, United States District Judge. On October 22, 1941, immediately after the plaintiff had completed the presentation of its evidence in support of its case in chief, Anchor Hocking Glass Corporation and its associated individual defendant officers and directors, including appellants, T. C. Fulton, W. V. Fisher and J. D. Dilworth, filed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, their joint and several motion for dismissal, and rested as of said time, and did not participate further in the case, submitting the case as to them upon said evidence presented by the plaintiff in support of its case in chief.

On February 27, 1942, the court dismissed Anchor Hocking Glass Corporation and all associated individual defendant officers and directors with the exception of the defendant Isaac J. Collins, for lack of evidence connecting them with any of the alleged conspiracies, monopolies and combinations. On May 15, 1942, plaintiff filed a motion for rehearing of said motion of defendant Anchor Hocking Glass Corporation and associated individual defendant officers and directors for dismissal. On June 26, 1942, said court denied plaintiff's motion for rehearing aforesaid except as to the appellants T. C. Fulton, W. V. Fisher and J. D. Dilworth, with respect to whom, upon reconsideration, the court denied the aforesaid motion for dismissal as to them.

On October 8, 1942, said court entered a Final Judgment ordering, adjudging and decreeing that these appellants, T. C. Fulton, W. V. Fisher and J. D. Dilworth, had acted in violation of Sections 1 and 2 of the Sherman Act, and said Final Judgment generally enjoined Hartford-Empire Company and certain of the other defendants, including appellants, from further violation of the Sherman Act, and

specifically enjoined certain practices and required affirmative action. (The provisions of the judgment applicable to appellants as herein summarized are also largely applicable to the other defendants, and there are other detailed provisions as to them.)

Appellants are specifically enjoined, together with the defendant directors and officers of the corporate defendants, from holding or controlling, directly or indirectly, or through corporations, agents, trustees, representatives, or nominees, any of the issued and outstanding capital stock, bonds or other evidences of indebtedness of, or holding at the same time an office or directorship in more than one corporation engaged either in the manufacture and sale of glassware or in the manufacture or distribution of machinery used in the manufacture of glassware, or in both, and are prohibited while engaged either in the manufacture and sale of glassware or in the manufacture or distribution of machinery to be used in the manufacture of glassware, or both, from acquiring, purchasing, holding or controlling, directly or indirectly, or through agents, representatives or nominees, any of the assets or any of the capital stock or bonds or other evidences of indebtedness of any other defendant corporation, or of any other corporation, firm or individual so engaged. The judgment requires appellants to divest themselves of their Hartford-Empire Company stock or Anchor Hocking Glass Corporation stock within two years from the effective date of said judgment.

Appellants are also enjoined from engaging in the distribution of machinery used in the manufactue of glassware in interstate commerce unless all defendants, including appellants, shall offer by written instrument, filed with the Clerk of the Trial Court, to sell such machinery to all applicants by outright sale, at reasonable and equal prices and upon reasonable and equal terms and conditions of sale, failing which appellants are enjoined from engaging

in the distribution of machinery used in the manufacture of glassware or in the distribution of glassware in interstate commerce.

The judgment also requires appellants to license all applicants at a reasonable royalty any number of machines and methods used in the manufacture of glassware and embodying inventions covering patents granted on patent applications filed subsequent to the date of the judgment and owned or controlled by appellants, said royalty to be subject to court approval and all without limit as to use. The license form is subject to court approval and various usual and customary provisions are prohibited. Appellants are prohibited from acquiring patent rights in processes similar or alternative to processes covered by patents already owned by appellants and are enjoined from employing various usual practices and procedures with respect to obtaining patents or protecting against infringement thereof.

Appellants are also enjoined from combining or agreeing as to production limitation of glassware or machinery used in the manufacture of glassware, price fixing and the collection and dissemination of production and other statistics.

The oral opinion rendered by the trial court February 27, 1942, in connection with the granting of the motion of Anchor Hocking Glass Corporation and associated individual defendants (with the exception of defendant Isaac J. Collins) to dismiss, the oral opinion of the trial court rendered June 26, 1942, overruling plaintiff's motion to rehear the motion of Anchor Hocking Glass Corporation and associated individual defendants to dismiss the complaint with the exception of the individual defendants T. C. Fulton, W. V. Fisher and J. D. Dilworth, with respect to whom the motion for rehearing is granted, and upon reconsideration the motion for dismissal is denied as to them,

and the opinion of the trial court in connection with the rendering of the Final Judgment, are appended hereto.*

Dated: December 7, 1942.

Respectfully submitted,

HUGH C. LAUGHLIN,
Lancaster, Ohio;
FRED E. FULLER,
807 Ohio Bldg., Toledo, Ohio;
Counsel for Defendants T. C. Fulton, W. V. Fisher and J. D. Dilworth.

FRED A. SMITH,
807 Ohio Bldg., Toledo, Ohio.
WELLES, KELSEY, COBOURN & HARRINGTON,
807 Ohio Bldg., Toledo, Ohio.

---

* (Clerk's Note—Opinion upon rendition of Final Judgment is printed as a separate volume.)

APPENDIX "A".

Oral Opinion Rendered by the Court, February 27, 1942, Granting Motion of Anchor Hocking Glass Corporation and Associated Individual Defendants to Dismiss.

Transcript 11254, et seq.

THE COURT: Now, in connection with the Anchor-Hocking matter, I think so far as the Court is concerned that has been the hardest problem before the Court. The motion of the Anchor-Hocking is for the discharge of the defendant corporation, as well as the discharge of some five or six individuals who constitute its officers and directors, viz: Isaac J. Collins, J. D. Dilworth, W. V. Fisher, T. C. Fulton, Herman Krannert, V. E. Macy, Jr., J. H. Moffett, Ernest Stauffen, Jr., L. B. Williams, J. O. Deegan, B. E. Factor, C. D. King, H. J. Carr, H. C. Laughlin, H. J. Hamlin, and F. B. Schlub, and each of them.

There has been a lot of evidence, the record is replete with a lot of steps taken by the Hocking Company up until its affiliation with Anchor-Hocking and various acts are charged during the course of quite a number of years of the violation of the Anti-trust Act, the onus of which is sought to be cast upon the shoulders of the present Anchor-Hocking Glass Corporation.

The Hocking concern, as I recall, was organized back as far as 1906, and Mr. I. J. Collins has been its president for a great many years. Mr. I. J. Collins seems to have been a busy man, and along about 1929, he, having become a stockholder of the Monongah concern, decided that he would become its president, and was thereupon named its president. Some time thereafter the Monongah concern gave up the ghost and was taken over and its assets taken over by the Turner Company. The Turner Company was a company in which Mr. I. J. Collins had some stock, and so Mr. Collins became a director on the board of the Turner Corporation, about 1930, and proceeded to exercise his authority as a member of that board. The Turner Corporation, however, in the space of four short months, went

into the hands of a receiver and was sold out through the Federal Court at, I believe, Indianapolis. There were negotiations that are claimed to have been vicious, over a period of years, between Mr. I. J. Collins and Mr. Mandeville, of Thatcher, seeking a combination of the Thatcher and the Hocking interests for the purpose of combining their efforts in the glass making industry. There was some effort made that resulted in the organization of the General, at the time that Turner gave up the ghost. And Thatcher and Hocking each agreed to supply half of the capital in the organization of General, which took over the assets of Turner, and possibly some remaining assets of the Monongah,—I don't just recall at this time. At any rate, after General had operated for a while and apparently required large sums of cash over a period of time in its operation, some sort of a suggestion was made one day by Mr. William E. Levis to Mr. Collins. I find no indication that a firm offer was made, but the psychological effect was there of the sum implanted upon the mind of Mr. Collins, that perhaps the sum of $750,000 would buy his half-interest in General. Whereupon Mr. Collins approached Mr. Mandeville, of Thatcher, and said, "Now, I believe I am prepared to pay you $750,000 for your half of Thatcher," whereupon Mr. Mandeville said "fine", and Mr. Collins found himself in possession of General. Thereupon the Thatcher concern reaped a profit after taking what it had invested in General of $510,000. Now, I see no harm in that so far as Mr. Collins was concerned. I don't see he violated the law in any way by that sort of transaction and I don't know that any law was violated so far as the law of the land is concerned, in the course of that transaction. Anyhow, following that, the problem came up of a combination of the Anchor Hocking and of the Anchor Cap Corporation that was in control, as wholly-owned subsidiaries, of Capstan and Salem as manufacturing agents.

Now, the mere fact that Mr. Levis introduced Mr. Stewart or some member of the board of directors, I believe Mr. Dilworth, to Mr. Collins, in the course of that transaction, is no indication to me there was any violation

of the Sherman Anti-Trust Act there. At any rate that combination was made. It was not a combination of competing industries as such. I can see no violation of the law, in that there was an illegal merger of those particular concerns. So I can find no violation there.

Now, the present Anchor-Hocking concern is the outgrowth of that combination, I think in 1938, and Mr. I. J. Collins is the president of that new concern, which now is a concern operating the Capstan and Salem Companies and the Anchor Cap Company, which is not a glass-making concern, the remnants of Monongah and of Turner and of General, and, of course, the physical body of the Hocking concern. It undoubtedly is a very large corporation now, but I cannot find in the course of studying the history of these various transactions that so far as this corporation, the Anchor-Hocking, is concerned, that there has been any violation of the law by it, and I cannot bring myself to believe that any alleged violations of the law on the part of Capstan or Salem, or in the collapse of Monongah and Turner, are inherited and cast upon the shoulders of the present Anchor-Hocking Glass Corporation.

Therefore, I think so far as Anchor-Hocking Glass Corporation is concerned, and so far as its officers and directors are concerned, save with the exception of Isaac J. Collins, that the motion ought to be sustained. I think that so far as the Court is concerned, he has a duty to retain Isaac J. Collins as a party defendant in this case. I think the record justifies the Court's retaining Isaac J. Collins as a party in this case until such time as the Court has concluded the case. If the Court feels that some relief is due from the Court eventually as against certain defendants in this case, he may feel that same course might necessarily be followed with relation to the future activities of I. J. Collins.

The other motions are sustained, so far as the Anchor-Hocking and the other defendants are concerned.

APPENDIX "B".

Oral Opinion of the Court Rendered, June 26, 1942, Overruling Plaintiff's Motion to Rehear the Motion of Anchor-Hocking Glass Corporation and Associated Individual Defendants for Dismissal of the Complaint, Save and Except as to the Individual Defendants T. C. Fulton, W. V. Fisher and J. D. Dilworth, with Respect to Whom Said Motion for Rehearing Is Granted, and Upon Reconsideration the Motion for Dismissal Is Denied as to Them.

Transcript 11277–11278

THE COURT: I think that it might be well, before we proceed with the argument, to take up certain motions that have been filed and are pending and undisposed of.

* * * * * * *

There is a motion to reconsider the decision of the Court heretofore rendered on the motion of the defendant Anchor-Hocking Corporation for dismissal at the conclusion of the plaintiff's case. Briefs have been filed, extensive briefs, in support of that motion by the government and in opposition thereto by the Anchor-Hocking. Those briefs have been given careful study by the Court. The Court feels that he is not justified in changing his former ruling in sustaining the motion to dismiss the complaint as against the Anchor-Hocking Corporation, and so the motion to reconsider will be overruled.

The Court does feel that so far as the matters pertaining to Isaac J. Collins, J. D. Dilworth, W. V. Fisher and T. C. Fulton are concerned, that these defendants in connection with the Anchor-Hocking Corporation ought to be retained as parties defendant, and in the entry providing for the dismissal, sustaining of the motion as regards the Anchor-Hocking, the dismissal of the Anchor-Hocking concern, these four gentlemen shall be retained as parties defendant.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 18 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1943

No. [redacted] 11

T. C. Fulton, W. V. Fisher and J. D. Dilworth,
Appellants,

vs.

The United States of America,
Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Western Division

BRIEF ON BEHALF OF APPELLANTS

Fred E. Fuller,
807 Ohio Bldg., Toledo,
Attorney for Appellants T. C. Fulton, W. V. Fisher and J. D. Dilworth.

George D. Welles,
Fred A. Smith,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1943

No. 16

T. C. FULTON, W. V. FISHER AND J. D. DILWORTH,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Western Division

---

BRIEF ON BEHALF OF APPELLANTS

FRED E. FULLER,
807 Ohio Bldg., Toledo,
Attorney for Appellants T. C. Fulton, W. V. Fisher and J. D. Dilworth.

GEORGE D. WELLES,
FRED A. SMITH,
Of Counsel.

INDEX

Page

I. Opinion Below 1

II. Jurisdiction. 2

III. Statement of the Case 2

(a) Introductory. 2

(b) Nature of the Case 3

(c) The Alleged Connection and Participation of These Appellants 4

(d) Proceedings Below 6

IV. Specification of Errors 11

V. Argument 13

Point 1

None of These Appellants in Any Wise Participated in or Became Connected With or in Any Wise Responsible for the Asserted Conspiracy and Monopoly and They Should Have Been Dismissed Along With Anchor Hocking and Its Other Associated Defendant Officers and Directors. 13

1. As a Matter of Law, No Connection or Participation Could Have Resulted From Appellants Having Been Officers or Directors of Anchor Hocking and the Court Erred in Holding to the Contrary 13

2. As a Matter of Law No Connection or Participation Can Be Imputed to Any of These Appellants Through the Acts of Any of the Other Corporate Defendants Because None of Them Was Either an Officer, Director or Agent Thereof. 16

Page

3. The Findings of Fact Are Insufficient as a Matter of Law to Support a Conclusion That Any of the Appellants Were Connected With the Asserted Conspiracy, etc., Either as Individuals or Through Any of the Corporate Defendants, and There Is No Evidence of any Such Connection. 18

4. As a Matter of Law, the Mere Ownership of Stock of a Corporation (Hartford) Found to Have Violated the Anti-trust Laws Furnishes No Basis for Imputing Such Violation to the Owner of Said Stock or for Holding That Said Owner Thereby Became a Party to the Asserted Conspiracy, etc., and the Record Does Not Support Any Such Conclusion..... 21

Point 2

The Court Below Was Without Jurisdiction Under Rules 6, 58, 59 and 79 of the Federal Rules of Civil Procedure to Entertain or Grant "Plaintiff's Motion for Rehearing of Motion of Defendant Anchor Hocking Glass Corporation and Related Defendants (Including Appellants) to Dismiss the Complaint"..... 23

Point 3

The Provisions of the Final Judgment as to These Appellants Are Not Only Wholly Unsupported by Any Evidence or Findings But are Unnecessarily Harsh and Severe, Impose Purely Punitive Restraints Upon Them, and Are Unwarranted and Beyond the Power of the Court Under Section 4 of the Sherman Act..... 28

Conclusion 30

Appendix 33

INDEX OF AUTHORITIES

	Page
Chrysler Corp. vs. United States, 316 U. S. 556	2
Safeway Stores, Inc., vs. Coe, 136 Fed. 2d 771	27
United States vs. E. I. DuPont de Nemours & Co., 188 Fed. 127	22
United States vs. Masonite Corp., 316 U. S. 265	2
United States vs. Univis Lens Co., 316 U. S. 241	2
15 U. S. C. A., Sec. 24	14, 29
Sec. 29	2
28 U. S. C. A., Sec. 345	2
Sherman Act, Section 1	2
Section 2	2
Section 4	2
Clayton Act, Section 3	2
Section 14	14, 29
32 Stat. 823	2
36 Stat. 1157	2
36 Stat. 1167	2
38 Stat. 804	2
43 Stat. 938	2
Federal Rules of Civil Procedure, Sec. 6	26, 28
Sec. 58	25, 28
Sec. 59	26, 28
Sec. 79	26, 28

IN THE

Supreme Court of the United States

October Term, 1943

No. 16

T. C. FULTON, W. V. FISHER AND J. D. DILWORTH,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF ON BEHALF OF APPELLANTS

I. OPINION BELOW

The District Court rendered three opinions pertinent to this appeal.

The first was an oral opinion[1] rendered on February 27, 1942, as of the conclusion of the plaintiff's case in chief, granting the motion for dismissal of the defendant Anchor Hocking Glass Corporation and *all* of its associated defendant officers or directors, *including these appellants*, except Isaac J. Collins.[2] This opinion is not reported.

The second was an oral opinion[3] rendered on June 26, 1942, overruling plaintiff's motion for a rehearing of the above motion to dismiss except as to *these* appellants with respect to whom, upon reconsideration, the court denied the

[1] R. 6842.
[2] Appellant in Appeal No. 15.
[3] R. 6854.

aforesaid motion for dismissal as to them. This opinion is not reported.

The third opinion[4] (filed August 25, 1942) rendered upon the merits at the conclusion of the entire case, is reported in 46 Fed. Supp. 541.

II. JURISDICTION

The jurisdiction of this court is based upon Section 2 of the Expediting Act of February 11, 1903 (32 Stat. 823) as amended by the Act of March 3, 1911 (36 Stat. 1167; 15 U. S. C., Section 29) and upon Section 238 of the Judicial Code as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938; 28 U. S. C., Section 345). *United States vs. Masonite Corporation*, 316 U. S. 265; *United States vs. Univis Lens Co.*, 316 U. S. 241; *Chrysler Corporation vs. United States*, 316 U. S. 556. Probable jurisdiction was noted on March 1, 1943. The judgment of the court below was entered on October 8, 1942, and the petition for appeal was filed and allowed on December 7, 1942.

III. STATEMENT OF THE CASE

(a) Introductory

This is one of ten separate appeals (Nos. 7 to 16, inclusive) arising out of a single proceeding had in the District Court of the United States for the Northern District of Ohio, Western Division, wherein the United States sought under Section 4[1] of the Sherman Act to "prevent and restrain" alleged violations of Sections 1[1] and 2[1] of the Sherman Act and Section 3[1] of the Clayton Act.

By stipulation[2] between the appellee and the appellants

---

[4]Printed as separate volume of record.
[1]Printed in full in Appendix, pp. 33-35, *post*.
[2]Filed with the Clerk of this Court on March 4, 1943.

in the various appeals, for convenience a single consolidated record on appeal has been printed embodying all of the evidence deemed relevant to any issue in any of the appeals.

The issues involved in this appeal are in the main not common to any of the other appeals (except the appeal No. 15 of Isaac J. Collins, as to which some issues, but not all, are common) and will require consideration of only a very minor portion of the proceedings below as embodied in the consolidated record, and we shall accordingly limit our brief to a consideration thereof.

(b) Nature of the Case

On December 11, 1939, the United States filed the complaint in this case against twelve *corporate* defendants[3] charging (as amplified by bills of particulars) that over a period of years beginning in about 1916 there had been established and maintained by and between certain of the *corporate* defendants in violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, a "principal" conspiracy, combination in restraint of trade and a monopoly with respect to (1) patents covering automatic machinery for the production of pressed and blown glass-

[3]Hartford-Empire Co.; Corning Glass Works; Empire Machine Co. (dissolved in the course of the proceedings); Owens-Illinois Glass Co.; Hazel-Atlas Glass Co.; Thatcher Manufacturing Co.; Lynch Corporation; Ball Brothers Company; Glass Container Association of America, Inc.; The Stevenson Corporation (dismissed in the course of the proceedings); Liberty Glass Company and Anchor Hocking Glass Corporation. The latter two companies were dismissed upon motion as of the conclusion of the plaintiff's case. For convenience, we shall refer to the various parties as plaintiff or defendant as they were in the court below, and to the former defendant Anchor Hocking Glass Corporation as "Anchor Hocking," and make similar abbreviations of the names of the other corporate defendants in the court below. Unless otherwise indicated, all italics, parentheses, bold faced type and other forms of emphasis incorporated throughout this brief are ours.

ware and glass containers, and (2) the manufacture and distribution of automatic machinery for the production of pressed and blown glassware and glass containers; and that incidental to said "principal" conspiracy, combination and monopoly[4] certain "incidental" conspiracies, combinations and monopolies[4] were from time to time established and effectuated through the conditional and restrictive licenses granted under said patents and the conditional and restrictive leasing of glass making machinery by means of which those *corporations* having control of said patents and machinery were able to and did restrict (1) the manufacture and sale of such machinery and (2) the manufacture and sale of glassware in violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. It was further charged that the various *corporate* defendants from time to time either directly joined said "principal" conspiracy, etc., or became connected therewith, a member thereof and a participant therein through one or more of said "incidental" conspiracies, etc.

Officers and directors of each of the corporate defendants were also made defendants and charged with participation in the foregoing through the direction and management of the corporate defendants with which they were respectively associated as such officers or directors.

(c) The Alleged Connection and Participation of These Appellants

Among the twelve corporate defendants below was Anchor Hocking Glass Corporation of Lancaster, Ohio, of which the appellants herein were and are either officers or directors. None of the appellants is or was at the time

---

[4]The complaint refers to a conspiracy, combination and monopoly. In the interest of brevity we shall include all of these in the term "conspiracy, etc.," in our references throughout the brief.

this suit was filed an officer or director of any other corporate defendant or of any other company (except Anchor Hocking subsidiaries) engaged in the glass business.[5]

Appellants and thirteen other officers or directors of Anchor Hocking were named in the complaint[6] as defendants who

> "have been and are officers or directors, and have participated and participate in the direction and management of defendant *Anchor Hocking*. Such individual defendants have approved, authorized, ordered and done some or all of the acts herein alleged to have been performed by defendant *Anchor Hocking*."

The complaint similarly named as individual defendants associated with the various other corporate defendants, the officers and directors thereof, and in each instance made a similar allegation as to their participation in the direction and management of the respective corporations of which they were officers or directors.

The above quoted paragraph of the complaint is the sole allegation in the entire complaint as to the capacity in which these appellants were joined as defendants below. *They were in no wise charged with any violation of the anti-trust laws either individually or otherwise except through their participation in the direction and management of Anchor Hocking.*

Anchor Hocking is and at all times has been strictly and exclusively engaged in the *manufacture of various lines of glassware,* caps and closures for glass containers, and packing boxes for glass articles for its own use or sale.[7] It has never engaged either in the business of holding or acquiring patents relcting to glass making machinery or

---

[5]FF. 23, R. 7282.
[6]Par. 25 of Complaint, R. 9.
[7]R. 2894.

otherwise or licensing others thereunder. Nor has it ever manufactured and licensed, leased or distributed glass making machinery. The patent and machinery situation in the glass industry is in no wise of its making and it has never had any control over or part in determining the policies followed by the patent owners or machinery manufacturers either in connection with the licensing under said patents or the leasing of glass making machinery made pursuant thereto.

In the conduct of its business of manufacturing glassware, Anchor Hocking uses largely automatic machinery leased or licensed to it for said purpose by the defendant Hartford-Empire under the latter's patents. The terms and conditions of its licenses and leases were necessarily determined in the last analysis by the owners of the patents and machinery.[8] From the very beginning Anchor Hocking, its predecessors, and subsidiaries, persistently sought the removal of the various restrictive provisions herein complained of from their respective licenses and leases.[9]

The complaint charged[10] that Anchor Hocking joined the asserted conspiracy, etc., *in 1937* (December), through the purchase of the assets of Hocking Glass Company, which purchase was charged to have been induced by the defendants Hartford-Empire and Owens.

(d) Proceedings Below

On October 22, 1941, at the conclusion of the government's case in chief, *Anchor Hocking* and all its associated individual defendant officers and directors, *including these appellants*, filed a motion for dismissal, *rested* as of that time, and *did not participate* further in the trial.[11]

---

[8]R. 3424.
[9]R. 2895, 2903, 2980-1, 2992, 2993, 2994, 2999, 3000, 3002, 3023.
[10]Par. 169 of Complaint, R. 49.
[11]R. 526-7; 4247; 4281; 6024.

The principal basis upon which said motion was rested was that Anchor Hocking and its associated officer and director defendants had not been shown to have had any connection with or participation in the alleged conspiracy, etc., nor with or in any of the acts, policies or practices in connection therewith which were in any wise unlawful.

On February 27, 1942, the court so found and determined and entered an order on the civil docket of said court[12] granting said motion for the dismissal of Anchor Hocking and all (with the exception of Isaac J. Collins) of its associated individual defendant officers and directors, *including these appellants.*

In connection with the granting of said motion the court expressly stated that he could find no indication of any violation of the anti-trust laws in the transaction whereby Anchor Hocking was claimed to have joined the asserted conspiracy, etc., in December, 1937, *viz.*, through the purchase of the assets of Hocking Glass Company, or otherwise, and concluded:[13]

> "Therefore, I think so far as *Anchor Hocking Glass Corporation* is concerned, and so far as its *officers* and *directors* are concerned, save with the exception of Isaac J. Collins, that the motion ought to be sustained.
>
> "The other motions are sustained, so far as the Anchor Hocking and the other defendants are concerned."

Isaac J. Collins was held in the case (we believe erroneously, as set forth in a separate brief filed in his behalf in appeal No. 15), for reasons wholly unconnected with his relationship to Anchor Hocking.

Some two and a half months after the entry of said order of February 27, 1942, *viz.*, on May 15, 1942, plaintiff

---

[12]R. 530.
[13]R. 6844.

filed a motion for rehearing of the motion for dismissal aforesaid.[14]

On June 26, 1942, the court entertained and considered but denied plaintiff's motion for rehearing as to Anchor Hocking and all other associated individual defendant officers and directors who had previously been dismissed from the case except these appellants, with respect to whom, upon reconsideration, the court set aside its previous order granting the motion for dismissal as to them, and denied said motion for dismissal as to them. In disposing of the motion for rehearing, the court said:[15]

> "The court feels that he is not justified in changing his former ruling in sustaining the motion to dismiss the complaint as against the Anchor Hocking Corporation, and so the motion to reconsider will be overruled.
>
> "The court does feel that so far as the matters pertaining to Isaac J. Collins, *J. D. Dilworth, W. V. Fisher and T. C. Fulton are concerned, that these defendants in connection with the Anchor Hocking Corporation ought to be retained as parties defendant*, and in the entry providing for the dismissal, sustaining of the motion as regards the Anchor Hocking, the dismissal of the Anchor Hocking concern, these four gentlemen shall be retained as parties defendant."

The United States did not appeal from the orders of the court dismissing Anchor Hocking and (with the exceptions above noted) the individual defendants associated with it as officers and directors. Hence such judgment of dismissal is final and neither Anchor Hocking nor (with the exceptions above noted) any of said individuals are parties to any proceedings in this court.

On August 25, 1942, the court filed its opinion upon the

---

[14]R. 530-1.

[15]R. 6854. See R. 531 for formal order disposing of said motion for rehearing.

merits. In the entire one hundred sixty-five pages there is not so much as a single reference to any one of these appellants.

On August 27, 1942, the court entered its Findings of Fact (628 in number) and its Conclusions of Law (89 in number) upon the entire case. Of these, only eight so much as mention any of these appellants.[16]

On October 8, 1942, the court entered a final judgment, from which appellants promptly perfected this separate appeal.

It is difficult, if not impossible, to determine from the judgment and the meager applicable findings of fact and conclusions of law[16] whether the court overruled the aforesaid motion for dismissal as to these appellants upon the theory that each of said appellants *in his individual capacity* had in some way become connected with and participated in the asserted conspiracy, etc., or whether such adjudged connection and participation was *derivative* in character through some connection or association with one of the corporate defendants. Throughout the entire judgment[17] the other individual defendants are invariably referred to and characterized as "individual defendants associated with" the respective corporations of which they are officers or directors, whereas in each case *these appellants* are separately named as individual defendants without any such indicated corporate association or connection. This would seem to indicate that appellants were found to have been parties to the asserted conspiracy, etc., and to have in some way violated the anti-trust laws in their individual capacities. But *there is not a single finding of fact which even*

---

[16]FF. 23, R. 7282; FF. 621, R. 7399; FF. 622, R. 7399; FF. 627, R. 7399; and FF. 628, R. 7400; CL. 86, R. 7419; CL. 89, R. 7420. These will be discussed in detail *post* in the section devoted to the Argument.

[17]Pars. 3, 4, 6, 9, 21, 23, 24, 25, 26, 29, 30, 32, 36, 39, 40, 51, 52, 53, and 54.

filed a motion for rehearing of the motion for dismissal aforesaid.[14]

On June 26, 1942, the court entertained and considered but denied plaintiff's motion for rehearing as to Anchor Hocking and all other associated individual defendant officers and directors who had previously been dismissed from the case except these appellants, with respect to whom, upon reconsideration, the court set aside its previous order granting the motion for dismissal as to them, and denied said motion for dismissal as to them. In disposing of the motion for rehearing, the court said:[15]

> "The court feels that he is not justified in changing his former ruling in sustaining the motion to dismiss the complaint as against the Anchor Hocking Corporation, and so the motion to reconsider will be overruled.
>
> "The court does feel that so far as the matters pertaining to Isaac J. Collins, *J. D. Dilworth, W. V. Fisher and T. C. Fulton are concerned, that these defendants in connection with the Anchor Hocking Corporation ought to be retained as parties defendant,* and in the entry providing for the dismissal, sustaining of the motion as regards the Anchor Hocking, the dismissal of the Anchor Hocking concern, these four gentlemen shall be retained as parties defendant."

The United States did not appeal from the orders of the court dismissing Anchor Hocking and (with the exceptions above noted) the individual defendants associated with it as officers and directors. Hence such judgment of dismissal is final and neither Anchor Hocking nor (with the exceptions above noted) any of said individuals are parties to any proceedings in this court.

On August 25, 1942, the court filed its opinion upon the

---

[14]R. 530-1.

[15]R. 6854. See R. 531 for formal order disposing of said motion for rehearing.

merits. In the entire one hundred sixty-five pages there is not so much as a single reference to any one of these appellants.

On August 27, 1942, the court entered its Findings of Fact (628 in number) and its Conclusions of Law (89 in number) upon the entire case. Of these, only eight so much as mention any of these appellants.[16]

On October 8, 1942, the court entered a final judgment, from which appellants promptly perfected this separate appeal.

It is difficult, if not impossible, to determine from the judgment and the meager applicable findings of fact and conclusions of law[16] whether the court overruled the aforesaid motion for dismissal as to these appellants upon the theory that each of said appellants *in his individual capacity* had in some way become connected with and participated in the asserted conspiracy, etc., or whether such adjudged connection and participation was *derivative* in character through some connection or association with one of the corporate defendants. Throughout the entire judgment[17] the other individual defendants are invariably referred to and characterized as "individual defendants associated with" the respective corporations of which they are officers or directors, whereas in each case *these appellants* are separately named as individual defendants without any such indicated corporate association or connection. This would seem to indicate that appellants were found to have been parties to the asserted conspiracy, etc., and to have in some way violated the anti-trust laws in their individual capacities. But *there is not a single finding of fact which even*

---

[16]FF. 23, R. 7282; FF. 621, R. 7399; FF. 622, R. 7399; FF. 627, R. 7399; and FF. 628, R. 7400; CL. 86, R. 7419; CL. 89, R. 7420. These will be discussed in detail *post* in the section devoted to the Argument.

[17]Pars. 3, 4, 6, 9, 21, 23, 24, 25, 26, 29, 30, 32, 36, 39, 40, 51, 52, 53, and 54.

purports to support any such conclusion nor is there a scintilla of evidence in the entire record in any wise supporting the same.[18] On the other hand, Conclusion of Law 89[19] reads:

> "89. Each of the above named[20] individual defendants has violated Sections 1 and 2 of the Sherman Act *in that he has authorized, ordered or done some of the acts heretofore found to have been done by one or more of the corporate defendants.*"

This would seem in terms to make each of these appellants' connection with and participation in the asserted conspiracy, etc., derivative in character and to rest the same upon some association or connection with one of the corporate defendants. And yet here, too, there is not a single finding of fact which even so much as refers to any of the appellants as having authorized, ordered or done any of the acts of any of the corporate defendants[21] except as having participated "in the direction and management of"[22] the dismissed Anchor Hocking. But of course as a matter of law no violation of the anti-trust laws could be imputed to appellants through Anchor Hocking, for it has been finally and completely absolved from any connection with the asserted conspiracy, etc.[18] Nor is there a scintilla of evidence in any wise tending to show that appellants "authorized, ordered or did" any acts of any of the other corporate defendants below which were in any wise found to have been unlawful.[21] Moreover, none of the appellants had any connection, official or otherwise, with any of the other corporate defendants except that each owns a comparatively small number of shares of the common stock of

---

[18]See Point 1 of Argument, p. 13 *et seq. post.*

[19]R. 7420.

[20]Referring to the individual defendants named in Conclusion of Law 86, R. 7419, which specifically names each of these appellants.

[21]As required by Sec. 14 of the Clayton Act.

[22]FF. 23, R. 7282.

the defendant Hartford.[23] While as pointed out *post*[24] this could furnish no basis upon which a connection with the asserted conspiracy, etc., could be lawfully rested, nevertheless it is in fact probably the reason why said appellants were erroneously held into the case.[25]

IV. SPECIFICATION OF ERRORS

The errors assigned by appellants cover 13 pages of the record.[1] All errors assigned are material to the issues discussed herein, are hereby specified as being relied upon and are designated and discussed under the various sections of the brief to which they relate. The following is merely a summary thereof:

1. The court below erred in overruling appellants' motion for dismissal and in finding as a fact and concluding as a matter of law that they or any of them had become connected with, had participated in and was a party to the asserted conspiracy and monopoly, and in entering its judgment against each of them because:

(a) As a matter of law, no connection or participation could be imputed to appellants, or any of them, through their having been officers and directors of the dismissed Anchor Hocking.

(b) There is not a single finding of fact nor a scintilla of evidence in the entire record which in any wise

---

[23]Fulton owns 3600 out of approximately 475,000 shares issued and outstanding (about ¾ of 1%). Fisher owns 450 out of approximately 475,000 shares issued and outstanding (less than 1/10 of 1%). Dilworth owns 8235 out of approximately 475,000 shares issued and outstanding (about 1¾%). See Exhibit 1583, R. 3904, 8095-8106D.

[24]See Point 1 of Argument, p. 13 *et seq. post.*

[25]See FF. 622, R. 7399; FF. 623, R. 7399; FF. 628, R. 7400.

[1]R. 7913-25.

supports the conclusion that any of the appellants became connected with or participated in the asserted conspiracy and monopoly, either in their individual capacity or through any of the corporate defendants.

(c) There is no finding of fact and no evidence that any of appellants "authorized, ordered or did any of the acts" of any of the corporate defendants which in whole or in part were found to have been violative of the anti-trust laws.[2]

(d) The mere ownership by each of the appellants of the small number of shares of Hartford stock which they respectively hold furnishes no basis for holding that they or any of them thereby became connected with, a participant in or are now members of the asserted conspiracy, etc.

2. The court below erred in entertaining plaintiff's motion for rehearing of appellants' motion for dismissal after the granting of the latter and in rehearing and denying said motion for dismissal.

3. The court below erred in the admission and consideration of certain evidence and in failing to rule upon and sustain appellants' motion to strike same.

4. The provisions of the final judgment as to appellants are not only wholly unsupported by any evidence or findings, but are unnecessarily harsh and severe, impose purely punitive restraints upon them, and are unwarranted and beyond the power of the court under Section 4 of the Sherman Act.

---

[2]As required by Sec. 14 of the Clayton Act.

V. ARGUMENT

Point 1

None of These Appellants in Any Wise Participated in or Became Connected With or in Any Way Responsible for the Asserted Conspiracy and Monopoly and They Should Have Been Dismissed Along With Anchor Hocking and Its Other Associated Defendant Officers and Directors.[1]

1. As a Matter of Law, No Connection or Participation Could Have Resulted From Appellants Having Been Officers or Directors of Anchor Hocking and the Court Erred in Holding to the Contrary.

In the oral opinion of the court reconsidering his previous action in dismissing these appellants and upon such reconsideration denying their motion for dismissal the court said:[2]

> "The court does feel that so far as the matters pertaining to * * * J. D. Dilworth, W. V. Fisher and T. C. Fulton are concerned, that these defendants *in connection with the Anchor Hocking Corporation* ought to be retained as parties defendant, etc."

This would seem to indicate an adjudged connection with the asserted conspiracy, etc., *through Anchor Hocking.*

Moreover, Finding of Fact No. 23[3] is as follows:

> "Defendants Isaac J. Collins, *J. D. Dilworth, W. V. Fisher and T. C. Fulton* have been and are officers or directors, and have participated and now participate in the direction and management *of defendant Anchor Hocking.*"

---

[1]The assignments of error relied upon in connection with Point 1 in the order discussed are numbers I (2), (3), (4), A, B, C, D and E, R. 7915-16; III 1A, 1B, 1C and 2, R. 7920; II 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, R. 7916-19.

[2]R. 6854; see also Conclusion of Law 89, R. 7420, quoted in full at page 10 *supra.*

[3]R. 7282.

This Finding correctly states the facts and is the sole basis upon which the complaint[4] charged these appellants with any connection with or participation in the asserted conspiracy, etc. But the court below found that Anchor Hocking had no connection with the asserted conspiracy, etc., had in no wise violated the anti-trust laws and dismissed it and its other associated defendant officers and directors. It therefore necessarily follows therefrom that violation of the anti-trust laws cannot now be imputed to these appellants through the dismissed Anchor Hocking. Nonetheless, the quotation *infra* from the opinion of the court below refusing to dismiss these appellants coupled with Finding of Fact No. 23 and Conclusion of Law No. 89, seems to clearly indicate an erroneous belief and decision to the contrary.

Derivative liability for violation of the anti-trust laws such as the complaint here charged against these appellants, must be rested, if at all, upon Section 14 of the Clayton Act,[5] which provides in part:

> "Whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers or agents of such corporation who shall have authorized, ordered or done any of the acts constituting, in whole or in part, such violation * * *."

Thus this statute in terms makes violation of the anti-trust laws by an individual arising out of his official connection with a corporation depend upon (a) *a violation by the corporation;* (b) the individual being or having been a director, officer or agent of said corporation (the statute does *not* refer to *stockholder*); *and* (c) such director, officer or agent having either (1) authorized, (2) ordered, or

---

[4]See par. 25 of Complaint, R. 9.

[5]Title 15 U. S. C. A., Sec. 24, printed in full in Appendix, p. 35 *post.*

(3) done some of the acts constituting a violation by said corporation.

The judgment of the court below dismissing Anchor Hocking conclusively establishes that that company did *not* violate the anti-trust laws and did *not* participate in or have any connection with the alleged conspiracy, etc., and that the acts charged to have been performed by it were lawful and proper, thus completely absolving it from all charges made against them herein. No appeal was taken by plaintiff, and that judgment is now final. Since under the provisions of Section 14 of the Clayton Act there must be a violation of the anti-trust laws by the corporation before "such violation" can be "deemed to be also that of the individual officers, directors or agents of such corporation," and since Anchor Hocking has been formally absolved from any such violation it is submitted that it cannot possibly be tenably claimed now that the requisite connection or participation of these appellants with the asserted conspiracy, etc., is to be found, as charged in the complaint, in their activities as officers or directors of Anchor Hocking.

Moreover, twelve of the sixteen officers or directors associated with Anchor Hocking as individual defendants in the court below were dismissed with Anchor Hocking.[6] These were all charged in the complaint[7] along with appellants as officers or directors who had participated "in the direction and management" of Anchor Hocking. The proof of such participation by appellants in the management of Anchor Hocking was not one whit different than that as to the dismissed officers and directors. Hence the dismissal of the other officers and directors also necessarily establishes that appellants cannot be properly held to have be-

[6]R. 532.

[7]See par. 25 of Complaint, R. 9.

come parties to the asserted conspiracy, etc., through Anchor Hocking.

Nor is there a single Finding, Conclusion, or provision of the Judgment which holds unlawful or in any wise violative of the anti-trust laws any of the acts or activities of or any of the transactions in which Anchor Hocking or its subsidiary or predecessor companies, or any of appellants, engaged.

Hence the charge in the complaint that appellants joined and participated in the asserted conspiracy, etc., through Anchor Hocking, is totally without any foundation in the record. Any other asserted basis of connection is a departure from and wholly without the scope of the complaint and under the plain and unambiguous provisions of Section 14 of the Clayton Act these appellants should have been dismissed along with Anchor Hocking and its other associated defendant officers and directors.

2. As a Matter of Law No Connection or Participation Can Be Imputed to Any of These Appellants Through the Acts of Any of the Other[8] Corporate Defendants Because None of Them Was Either an Officer, Director or Agent Thereof.

The record does not show that any of these appellants was ever an officer, director or agent of any of the other[8] corporate defendants below, and the fact is they never were. It would seem so self-evident that in such circumstances there could be no derivative liability imputed to appellants through any of such corporate defendants, with whom they had no official connection, as to require no discussion. Nevertheless, Conclusion of Law 89[9] is as follows:

---

[8]We have already pointed out that as a matter of law no connection with or responsibility for the asserted conspiracy, etc., could be imputed to appellants through Anchor Hocking.

[9]R. 7420.

> "Each of the above named individual defendants has violated Sections 1 and 2 of the Sherman Act in that he has authorized, ordered or done some of the acts heretofore found to have been done by one or more of the corporate defendants."

Either this conclusion of law erroneously purports to impute to appellants liability for violation of the anti-trust laws through Anchor Hocking (as to whom it was adjudged there was no violation) or through one of the other corporate defendants with whom none of these appellants had any relationship either as an officer, director or agent as required by Section 14 of the Clayton Act. Nor is there a shred of evidence nor a single finding that any of appellants "authorized, ordered or did" (Section 14 of the Clayton Act) any act of any corporate defendant other than Anchor Hocking.

Therefore, upon whichever theory these appellants were held by the court below to have become connected with and to have participated in the asserted conspiracy, etc., whether through Anchor Hocking or through one of the other corporate defendants, each is equally prejudicially erroneous and requires the reversal of the judgment as to all these appellants, and their dismissal by this court from the cause.[10]

---

[10]Throughout the trial, Anchor Hocking and its associated defendant officers and directors, including appellants, consistently objected (R. 1084, 2896, 2911, 2918) to the introduction or reception for any purpose *and particularly for the purpose of connection* of any evidence as to them which involved transactions, other than the purchase *in 1937* of the assets of Hocking Glass Company, which was the *sole* transaction through which it was alleged in paragraph 169 of the complaint they joined the asserted conspiracy, etc. (R. 49). All of the evidence, oral and documentary, was tendered and received in the cause subject to each defendant being connected into the alleged conspiracy and subject to a general objection by each defendant that all of such evidence was irrelevant, immaterial and incompetent for all purposes, including the purpose of connection (R. 643-5, 658, 1084, 2896, 2975, 2978, 3025-26). At the time that Anchor Hocking and its associated defendant officers and directors,

3. The Findings of Fact Are Insufficient as a Matter of Law to Support a Conclusion That Any of the Appellants Were Connected With the Asserted Conspiracy, Etc., Either as Individuals or Through Any of the Corporate Defendants, and There Is No Evidence of Any Such Connection.

In the interest of brevity and to avoid the necessity of extended argument of this point, we here set forth every finding of fact[11] which even so much as refers to any of the appellants, this that the court may see for itself the complete and total absence of any basis whatever for having held these defendants to have been parties to the asserted conspiracy, etc.

> "621. *T. C. Fulton* was one of the original organizers of *Hocking* in 1905 and thereafter he was secretary-treasurer, and a director of *Hocking*. He held the same titles in *General* from 1931 to 1938."
>
> "622. As a stockholder of Hartford, Fulton now owns and has owned for some time at least 3600 shares of the common stock of Hartford."

---

including appellants, filed their motion to dismiss, they also filed a "motion to strike evidence," which requested that as to them the court strike from the record all evidence relating to matters other than the purchase of Hocking or limit its use so as not to permit it to be considered *for connective purposes* in connection with the consideration of their motion to dismiss, the ground of the motion being that said evidence was irrelevant, incompetent and immaterial and a departure from and beyond the scope of the pleadings or any issues raised thereby, *particularly as to the issue of connection with the asserted conspiracy,* etc. (See motion, R. 533.) *The court never ruled upon this motion.* Failure to grant this motion was manifest error. Assignments of Error III, 1A, 1B, 1C and 2, R. 7919-20. No attempt was made to amend the complaint or otherwise amend the charges in this regard and the case is not one in which it would be proper to treat the complaint as if it had been amended for the reasons pointed out at pages 18-19 of appellant's brief in Appeal No. 15, which in the interest of brevity are not here repeated but are adopted by reference.

[11]Except Finding of Fact 23, already discussed at p. 13 *et seq. supra* and which merely sets forth that appellants participated in the management and direction of the dismissed Anchor Hocking.

"623. *W. V. Fisher* is vice-president and general manager of *Anchor Hocking*. He now owns and has owned for some years at least 450 shares of the common stock of Hartford."

"627. *J. D. Dilworth* was vice-president and director of *Anchor Cap Corporation*. In 1937, he executed a feeder license agreement between *Salem* and Hartford."

"628. As a stockholder of Hartford-Fairmont, Dilworth signed the agreement for the formation of Hartford-Empire Company. He now owns and has owned for some years, 8235 shares of the common stock of Hartford."

We submit that a mere cursory reading of the foregoing findings discloses not only that they furnish no basis for imputing to appellants any violation of the anti-trust laws through any of the corporate defendants under Section 14 of the Clayton Act for the reasons discussed *supra*, but also that they furnish no basis whatever for any conclusion or holding that appellants *individually* violated said laws, nor is there a scintilla of evidence upon which any such conclusion could be rested.

Finding 621 relates to appellant Fulton's official connection with Hocking Glass Company and General Glass Company. Neither of these companies were defendants below. They were predecessor companies of the dismissed Anchor Hocking and were dissolved in 1937[12] when their assets were purchased by Anchor Hocking. Neither Hocking nor General were found by the court below to have violated the anti-trust laws, nor was a single act or transaction of either of said companies adjudged to have been in violation of the anti-trust laws, either standing alone or as being in furtherance of the asserted conspiracy, etc., in combination with other transactions adjudged to be unlawful, or otherwise. Under the provisions of Section 14

[12]R. 49, 306-8.

of the Clayton Act a violation of the anti-trust laws by said companies would be a prerequisite to imputing any violation thereof to Appellant Fulton by reason of his having been an officer and director of said companies. Moreover, Anchor Hocking, its predecessors and subsidiaries, were wholly absolved from any connection with the asserted conspiracy, etc., through dismissal by the court below. Hence there is nothing in Finding 621 upon which the requisite connection of Appellant Fulton with the asserted conspiracy, etc., may be rested.

Similarly, Finding 623[13] merely recites[14] that Appellant Fisher is vice-president and general manager of the dismissed Anchor Hocking, and Finding 627[15] likewise recites that appellant Dilworth was vice-president and director of Anchor Cap, which is the former name of and the same corporation as the dismissed Anchor Hocking. Hence such findings of fact in so far as said recitals are concerned can furnish no basis for any conclusion of connection of or participation by any of the appellants in the asserted conspiracy, etc. Finding 627 also recites that appellant Dilworth "executed a feeder license agreement between Salem and Hartford" but neither this agreement nor the execution thereof was found to have been in violation of the anti-trust laws so far as Salem was concerned, nor was it claimed to have been such below. Salem is a subsidiary of the dismissed Anchor Hocking, was a licensee of Hartford, and was not a defendant below. Hence no liability for violation of the anti-trust laws could by any possibility be imputed to appellant Dilworth through his relationship to Salem.

This brings us to the element common to all of said

---

[13]R. 7399.

[14]Except as to the recitation of ownership of 450 shares of the common stock of the defendant Hartford, discussed *post*.

[15]R. 7400.

findings and to each of the appellants, *viz.*, the fact that each of these appellants owns a small but varying number of shares of the common stock of the defendant Hartford-Empire. This is, we believe, the real but nonetheless wholly erroneous reason why the court below found these appellants to have been parties to the asserted conspiracy, etc., and entered judgment herein against them.

4. As a Matter of Law, the Mere Ownership of Stock of a Corporation (Hartford) Found to Have Violated the Anti-trust Laws Furnishes No Basis for Imputing Such Violation to the Owner of Said Stock or for Holding That Said Owner Thereby Became a Party to the Asserted Conspiracy, Etc., and the Record Does Not Support Any Such Conclusion.

Appellant Fisher owns 450[16] shares, appellant Fulton 3600[17] shares and appellant Dilworth 8235[18] shares of the common stock of the defendant Hartford. This is less than 1/10 of 1%, about 3/4 of 1% and about 1 3/4% respectively of the total of such shares issued and outstanding.[19] Appellants are three of several hundred[19] stockholders of Hartford. By no possibility could it be claimed that appellants either singly or in their aggregate holdings are anything but small minority stockholders.

There is not a scintilla of evidence that any of these appellants even so much as voted said stock in favor of any of the transactions of Hartford found by the court below to have been violative of the law, let alone "authorized, ordered or did" any of said acts as such stockholder, or otherwise. Nor can there be any possible justification or explanation as to why these three small Hartford stock-

---

[16]FF. 623, R. 7399.
[17]FF. 622, R. 7399.
[18]FF. 628, R. 7400.
[19]Ex. 1583, R. 3904, 8095-8106D.

holders should be singled out and charged with responsibility for having violated the anti-trust laws by reason of having happened to own stock of one of the corporate defendants found to have violated such laws. There is no finding that there was anything in any wise unlawful in connection with the acquisition of such stock. As a matter of fact, any claim that these appellants became parties to and participated in said asserted conspiracy by reason of or through their ownership of said stock must have been a result of a clearly unwarranted imputation to mere stockholders of the wrongdoing of the corporation. Even the complaint made no such charge, and the manifestly tenuous character of such a claim aptly illustrates the complete lack of any reasonable or justifiable basis for having held these appellants to have been connected with the asserted conspiracy, etc.

The provisions of the anti-trust laws do not even purport to impose liability upon a mere stockholder for violation thereof by the company in which he happens to own stock, nor is a mere stockholder deemed to have violated the anti-trust laws through the violation thereof by the company in which he owns stock.[20] Section 14 of the Clayton Act does not even so much as mention a stockholder. Hence while each of these appellants does own stock in Hartford-Empire, that could not and does not furnish any basis either for concluding that they thus became connected with the asserted conspiracy, etc., or for imputing to them liability for any violation of the anti-trust laws which may have been committed by Hartford.

In so far as violations of the anti-trust laws through personal participation by any of these appellants in any of the acts or transactions adjudicated to have been violative thereof is concerned, we simply unequivocally say there is

---

[20] *U. S. vs. E. I. DuPont de Nemours & Co.*, 188 Fed. 127 (Del., 1911), Syl. 2.

no evidence of any such participation by any of these appellants in their personal capacity or otherwise.

Since the only official connection of any of these appellants either as "directors, officers or agents" of any of the corporate defendants is and has been exclusively with the dismissed Anchor Hocking, its predecessors and subsidiaries, and since as a matter of law no connection with, participation in or liability for the asserted conspiracy, etc., could possibly be rested thereon, and since neither the findings of fact nor the evidence disclose any basis upon which such requisite connection, participation or liability through that or any other corporate defendant, or individually, may be properly predicated, it is submitted that the court below erred prejudicially in failing to sustain appellants' motion for dismissal along with Anchor Hocking and its other associated defendant officers and directors, and in finding and adjudging to the contrary and in entering final judgment herein against appellants.

Point 2

The Court Below Was Without Jurisdiction Under Rules 6, 58, 59 and 79 of the Federal Rules of Civil Procedure to Entertain or Grant "Plaintiff's Motion for Rehearing of Motion of Defendant Anchor Hocking Glass Corporation and Related Defendants (Including Appellants) to Dismiss the Complaint."[1]

The complete lack of any findings or evidence in any wise connecting any of these appellants with the asserted conspiracy, etc., and the utter paucity of plaintiff's case in this regard is further demonstrated by a consideration of the error of the lower court in entertaining plaintiff's mo-

[1]The assignments of error relied upon in connection with Point 2 are I (1), R. 7914-15.

tion for rehearing and finally denying the appellants' motion for dismissal after having granted it in the first instance, which error is an additional compelling reason why these appellants should now be dismissed.

At the conclusion of the plaintiff's case in chief on October 22, 1941, Anchor Hocking and all its associated individual defendant officers and directors (including these appellants) filed a motion for dismissal.[2] Said movants rested as of that time and did not participate further in the trial.[3] On February 27, 1942, following the conclusion of the trial of the case, the court below *granted* said motion for dismissal as of the close of plaintiff's case in chief as to all of the movants, *including these appellants* (except as to Isaac J. Collins, appellant in Appeal No. 15) and entered an appropriate notation upon the civil docket of said court in accordance with Rule 79(a) of the Federal Rules of Civil Procedure sustaining said motion.[4] Copy of said entry was duly served, in conformity with Rule 77(d) of the Federal Rules of Civil Procedure, on February 27, 1942.[5]

Some two and a half months later, on May 15, 1942, plaintiff filed a motion for rehearing of said motion for dismissal.[6] The sole ground of said motion for rehearing was stated to be the decision of this court "in the case of *United States vs. Masonite Corporation,* which clarifies the law as to what constitutes participation in an anti-trust conspiracy, and, the plaintiff contends, requires a reversal by this court of its ruling on the aforesaid motion" for dismissal. Notwithstanding the lapse of time between the entry of the order aforesaid and the filing of said motion

---

[2]R. 526-7; 4281.
[3]R. 4247; 6024.
[4]R. 530.
[5]See docket entries (omitted in printing).
[6]R. 530-1.

for rehearing, the court entertained the same, and upon reconsideration, on June 26, 1942, purported to set aside its previous order sustaining said motion for dismissal as to these appellants by denying said motion for dismissal as to them.[7] In this connection, the court did not so much as mention[7] the sole ground upon which the motion for rehearing was rested, namely, the *Masonite* case, which in fact did not and does not have the slightest application to the facts and circumstances of these appellants as shown by the findings and record proof.

Rule 58 as to "Entry of Judgment" in so far as pertinent provides:

> "* * * When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. *The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment;* and the judgment is not effective before such entry."

This rule was followed by the court and clerk below on February 27, 1942, upon the granting of appellant's motion for dismissal.[8] A copy of the notation of the granting of said motion of dismissal so made upon the civil docket in accordance with Rules 58 and 79(a) was duly served upon appellants on February 27, 1942,[9] with the following notation:

> "In conformity with Rule 77(d) of the Federal Rules of Civil Procedure, please take notice that the following order or judgment[8] was entered on February 27, 1942. C. B. Watkins, Clerk, United States District Court, Northern District of Ohio."

---

[7]R. 531; 6854.
[8]R. 530-1.
[9]See docket entries (omitted in printing).

Rule 59 as to "New Trials" in so far as pertinent provides:

> "(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues * * * in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. * * *
>
> "(b) Time for Motion. *A motion for a new trial shall be served not later than 10 days after the entry of the judgment,* except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence."

Rule 6(b) as to "Enlargement" of "time" in so far as pertinent provides that the trial court

> "may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."

The exceptions referred to in subdivision (c) of Rule 59 are in no wise pertinent and furnish no basis upon which the prescribed time for the filing, entertaining and granting of the motion for rehearing in this matter could have been enlarged.

In derogation of these rules, the plaintiff filed and the court entertained and granted a motion for rehearing and reversal of an order of dismissal two and a half months after the same had been noted on the civil docket as provided by Rule 79(a), which by Rule 58 constituted "the entry of the judgment" of dismissal. This was more than sixty days beyond the time in which such action could have been taken under the provisions of Rule 59, and constituted manifest error in view of the action of the court in reversing his previous ruling dismissing appellants, and upon reconsideration thereof denying said motion for dismissal.

While this court has not had the occasion to consider the application and construction of Rules 6, 58, 59 and 79 to circumstances such as are here involved, the matter has been passed upon by the Court of Appeals for the District of Columbia in the case of *Safeway Stores, Inc., vs. Coe,* decided May 29, 1943, 136 Fed. 2d 771. In that case, as here, a motion to dismiss was granted, and more than ten days thereafter a motion to rehear the same was filed. There, as here, the motion for rehearing was entertained and considered, and in that case denied. Thereafter, the appellant gave notice of appeal. The question involved was whether the filing, consideration and entertaining of the motion for rehearing suspended the running of the time for appeal, which in turn was dependent upon whether such motion for rehearing was filed in time and whether the trial court had jurisdiction to entertain and consider the same. In holding that the motion for rehearing was untimely and that the court was without jurisdiction to entertain the same, the court there said:

> "We think that the purpose of Rule 6(b), which forbids the court to enlarge the time for taking any action under Rule 59, was to divest the court of jurisdiction to entertain a motion of this kind filed out of time. We said this much in *Hill vs. Hawes,* 76 U. S. App. D. C. 308, 132 F. 2d 569, 571, where it was held that the 'prohibition of Rule 6(b) * * * is absolute.' Prior to the adoption of the present Rules of Procedure Federal Courts had no power to entertain motions for new trials or petitions for rehearing after the term had expired. *United States vs. Mayer,* 235 U. S. 55, 35 S. Ct. 16, 59 L. Ed. 129 (new trial); *Lewisburg Bank vs. Sheffey,* 140 U. S. 445, 11 S. Ct. 755, 35 L. Ed. 493; *Wayne U. Gas Co. vs. Owens, supra* (rehearings). Rule 6(c) now abolishes the effect of the expiration of the term on the power of the court to act, Rule 59(b) provides a definite time within which a motion for new trial may be made, and Rule 6(b) forbids the court to enlarge that time. If it were not thereby intended to make the

> running of that definite time as conclusive on the power of the court as was formerly the expiration of the term, there would be no limit on the power of the court to act and no finality when it did act. A construction which would empower the court to hear motions long out of time would destroy the Rule, for by the very act of hearing, prohibited extensions could effectively be granted. As was said in *National Popsicle Corp. vs. Hughes*, D. C., 32 F. Supp. 397, 399: 'The power of the court over its final judgments must end some time. If the period of termination is specified in the Rules of Civil Procedure, that period governs. * * * Rule 6(c) is not itself a grant of power beyond the term.' * * *
>
> "In view of all of the above, we are of opinion that Safeway had only ten days after the judgment in which to apply for a rehearing, and that the court had no power to entertain its application after ten days had passed. * * *"

We submit that the rationale of the *Safeway* decision is sound, and that Rules 6, 58, 59 and 79 and the principle enunciated in the *Safeway* case furnish an additional reason why the judgment of the court below should be reversed and the complaint dismissed as to these appellants.

Point 3

The Provisions of the Final Judgment as to These Appellants Are Not Only Wholly Unsupported by Any Evidence or Findings but Are Unnecessarily Harsh and Severe, Impose Purely Punitive Restraints Upon Them, and Are Unwarranted and Beyond the Power of the Court Under Section 4 of the Sherman Act.[1]

We believe it will be unnecessary for this court to consider the details of the final judgment as they affect these

---

[1]The assignments of error relied upon in connection with Point 3 are numbers IV 4 A, B, C, D and E (1), (2), (3), (4), (5), (6) (a) and (b); 5, 6 and 7, R. 7920-24.

appellants for the reason that as shown in Point 1 of this brief, neither the findings of fact of the court below nor the evidence furnish any tenable basis upon which these individual appellants can be lawfully held to have ever become or to now be parties to the asserted conspiracy, etc. They could not possibly have become such through the dismissed Anchor Hocking. They were neither "directors, officers or agents"[2] of any corporation found to have violated the anti-trust laws, and there is not so much as a fragment of evidence, inferential or otherwise, of any violation of the anti-trust laws by any of the appellants in their individual capacities. Nevertheless, it is the inevitable implications and notorious incidents which invariably stem from any judgment in a case of this kind which render it imperative that this court lay bare and rectify the error and injustice done these individual appellants by the entry of judgment against them in the court below.

Believing, as we do, that for the purposes of this appeal this court will strike through the maze of the numerous and complex issues involved in the appeals of the corporate defendants and give an adequate independent consideration to the particular position of these individual appellants and the facts and circumstances upon which such position depends, we are content here to merely point out generally that the provisions of the final judgment in so far as these appellants are concerned far exceed the permissible limits as declared by the provisions of the anti-trust laws and the decisions of this court. Those adjudicated limitations and the manner and extent to which they have been disregarded in the framing of this judgment are discussed in Point 3 pages 44 to 61 of our brief filed in behalf of the appellant in Appeal No. 15, and in the interest of brevity and to diminish the burden imposed upon the court by the briefs

[2]Sec. 14 of Clayton Act, 15 U. S. C. A. 24.

of the many appellants, we simply adopt by reference that portion of that brief as a part of our argument on this point. The impact of the various provisions of the judgment upon these individual appellants is exactly the same as there discussed, and the provisions thereof are entirely inappropriate and improper as to these appellants for the same reasons there set forth.

CONCLUSION

Every individual defendant below was joined as such because of an official relationship to one of the corporate defendants, in the case of these appellants as officers or directors of Anchor Hocking. That company was found not to have in any wise been a party to the asserted conspiracy, etc., or to have otherwise violated the anti-trust laws, and it and (with the exception of these appellants and the appellant in Appeal No. 15) all of its associated individual defendant officers and directors were dismissed. The position of these four individuals who were held in did not differ in any respect from that of the other individual defendants associated with Anchor Hocking who were dismissed, except that they each chanced to own some shares of stock of one of the principal corporate defendants (Hartford), with which they had no other relationship. That was the sole differentiating basis upon which the government urged below that these appellants should be subjected to the decree of the court.[1] Apparently the court below accepted such as a sufficient basis of connection and participation. This was clearly error as a matter of law.

The effect of the judgment upon these appellants is so serious that we feel that we are justified in asking this court to push aside, in so far as this appeal is concerned,

---

[1]Page 195 of Reply Brief of the United States.

the many involved issues inhering in this case as respects the corporate defendants and to give separate attention to the particular situation in which these individual appellants and the appellant in Appeal No. 15 find themselves as a result of that judgment. We submit that the error of the lower court is so manifest and the prejudice therefrom is so great as that in common justice it must be rectified.

Respectfully submitted,

FRED E. FULLER,
Attorney for Appellants T. C. Fulton, W. V. Fisher and J. D. Dilworth.

GEORGE D. WELLES,
FRED A. SMITH,
Of Counsel.

Toledo, Ohio, September 30, 1943.

APPENDIX

Section 1, Sherman Act (15 U. S. C. A., Sec. 1):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

Section 2, Sherman Act (15 U. S. C. A., Sec. 2):

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, §2, 26 Stat. 209.

Section 4, Sherman Act (15 U. S. C. A., Sec. 4):

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. July 2, 1890, c. 647, §4, 26 Stat. 209; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167.

Section 3, Clayton Act (15 U. S. C. A., Sec. 14):

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price

charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, §3, 38 Stat. 731.

15 U. S. C. A., Sec. 24:

Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court. Oct. 15, 1914, c. 323, §14, 38 Stat. 736.